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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

BEFORE THE HONORABLE JACQUELINE SCOTT CORLEY, MAGISTRATE

IN RE: FACEBOOK, INC. CONSUMER)
PRIVACY USER PROFILE LITIGATION)
) No. 18-MD-2843 VC (JSC)
)
) San Francisco, California
) Friday
) May 29, 2020
) 1:00 p.m.

TRANSCRIPT OF ZOOM VIDEO CONFERENCE

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Friday - May 29, 2020

1:02 p.m.

P R O C E E D I N G S

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THE CLERK: Calling Civil Action 18-MD-2843, In Re Facebook, Inc. Consumer Private User Profile Litigation.

Counsel, starting with plaintiffs, please state your appearance for the record.

MR. LOESER: Good afternoon, Your Honor. Derek Loeser from Keller Rohrbach.

MS. WEAVER: Good afternoon. Leslie Weaver from Bleichmar Fonti also for plaintiffs.

MR. KO: Good afternoon, Your Honor. David Ko on behalf of plaintiffs.

MR. MONTGOMERY: Good afternoon, Your Honor. Matthew Montgomery for plaintiffs with BFA.

MS. DAVIS: And Anne Davis also with BFA and also for plaintiffs.

MS. ORNELAS: Good afternoon, Your Honor. Angelica Ornelas also from BFA and for plaintiffs.

(Brief pause.)

THE CLERK: Mr. Snyder, you're muted.

MR. SNYDER: Sorry. Orin Snyder, Martie Kutscher and Russ Falconer from Gibson Dunn for Facebook. Good afternoon, Your Honor.

THE CLERK: You just want to hold on a second?

1 **THE COURT:** Good afternoon. Can you hear me?

2 **THE CLERK:** Yes.

3 We lost your video. There you go.

4 (Brief pause.)

5 **THE CLERK:** Judge, can you hear us? We can hear you.

6 **THE COURT:** Okay. I can't hear you, so I'm going to
7 turn my computer off and turn it back on again.

8 **THE CLERK:** Okay.

9 (Brief pause.)

10 **THE COURT:** All right. Welcome, everyone. Thank you
11 for your statements and for working so hard.

12 So having read it, I think there are some things we should
13 discuss and, of course, set new dates and a new hearing date.
14 I see you came up with the schedule with respect to the
15 custodians, but then the plaintiffs said that they agreed on
16 the schedule on the condition that you agree to a protocol and
17 information exchange.

18 So I didn't know what that means. Do we need to set a
19 deadline for that so that the other schedule stays on track?

20 **MR. LOESER:** Your Honor, Derek Loeser for the
21 plaintiffs, and happy Friday, and thank you again for fitting
22 us into your schedule.

23 We did make progress. I think it's maybe cause for
24 celebration that these parties managed to submit an actual
25 joint statement. So we hope you appreciate that. And we will

1 take our accomplishments, small as they may be, in stride here.

2 It is a -- you know, these are kind of baby steps. And I
3 think Your Honor is exactly right that what's missing right now
4 is -- and what plaintiffs noted in the statement are some
5 deadlines that would attach themselves to these different
6 custodian groups that have been presented to you.

7 We have made a proposal to Facebook that would include
8 deadlines for search term agreement for the different groups
9 and, also, deadlines for the beginning of rolling production
10 for those different groups.

11 We've also made an agreement with Facebook on when they
12 are going to respond to our proposal. And so what will happen
13 is they have until next Wednesday to respond. We have agreed
14 to meet-and-confer on Thursday. And then on Friday we'll
15 either have an agreement or we will present to you the
16 competing proposals.

17 One thing I would like to suggest for that is it doesn't
18 really seem like something that should require a lot of
19 briefing. I mean, if we don't have an agreement, it will be
20 our proposal with dates and their proposal with dates. And we
21 think what might make sense is just to give you the two
22 proposals. And, again, really hoping there is agreement. But
23 if not, and you can decide. And we're available if you want to
24 have a quick call or something. If that works, we can just
25 quickly wrap that issue up.

1 **THE COURT:** Yeah. I think that might be something
2 easier to do in a conference.

3 **MS. KUTSCHER:** Yeah. And we in large part agree with
4 that.

5 I would just like to request that there is at least some
6 space for explanation, because there might be some reasons why
7 we would propose one thing and they would propose a different
8 thing. And we wouldn't need lengthy briefing, but I think we
9 should at least be able to explain a little bit why we might be
10 proposing something different.

11 **THE COURT:** I mean, I don't know --

12 (Audio interference.)

13 **THE COURT:** Is it better now?

14 We can have a hearing on that. Maybe the best way to do
15 it is just have you explain it orally.

16 **MS. KUTSCHER:** That's fine. As long as there is
17 space for some explanation at some -- in some form.

18 **MS. WEAVER:** And to clarify, Your Honor, what we had
19 sent over to Facebook is an actual form that lays out what
20 we're seeking. So they would propose search terms and provide
21 hit reports or some kind of data analytics, and then we would
22 respond. And it could be some kind of form that we could
23 exchange on a rolling basis for each RFP identifying proposed
24 terms. And that's what we proposed to them, but they needed
25 time to talk to their clients.

1 So we could submit those to Your Honor by Friday at
2 10:00 a.m. perhaps, and you can look at them, and then we can
3 talk about them. That's what we were envisioning. At least
4 plaintiffs were envisioning. We had talked about exchanging
5 something like that with Facebook, so.

6 **THE COURT:** All right. So what should we do today,
7 or what should I do today? Should we --

8 **MR. SNYDER:** Have a cocktail?

9 (Laughter.)

10 **THE COURT:** So maybe -- we have a plan and maybe what
11 we need is a date then for our next hearing. And if we were to
12 schedule something -- I'm actually doing a staycation that
13 week, but we can do something on that Thursday at 9:00 a.m.

14 **MS. KUTSCHER:** Is that Thursday the 11th or the 4th?

15 **THE COURT:** The 11th; right? Because it's the
16 following Friday that you would have something to me. So
17 Thursday, the 11th --

18 **MS. WEAVER:** No. Actually, Your Honor -- actually,
19 we were thinking this coming -- because we gave Facebook our
20 proposal this Wednesday.

21 **THE COURT:** Isn't today Friday?

22 **MS. WEAVER:** No, A week from -- sorry. We gave them
23 our proposal last Wednesday. They were going to get back to us
24 this coming Wednesday. And then we would confer on the
25 Thursday, and we could get you something on Friday. But we

1 could, if Facebook is willing, move it back by a day.

2 So maybe they could get back to us on Tuesday, and we
3 confer Wednesday, and then we could submit something to you
4 Thursday, next Thursday.

5 **THE COURT:** But I'm proposing we get together on
6 Thursday, the 11th.

7 **MS. WEAVER:** Okay. That's two weeks out.

8 **THE COURT:** Exactly.

9 **MR. SNYDER:** That's fine, Judge.

10 **MS. KUTSCHER:** That's fine.

11 **THE COURT:** Does that leave enough time on your
12 schedule?

13 **MR. SNYDER:** Yes, Your Honor.

14 **THE COURT:** If you get it to me by the 4th -- the
15 5th?

16 **MS. WEAVER:** Yes, yes. I think the concern we might
17 have about that is that that bumps -- like, one of the first
18 deadlines that we agreed to was June 10th, but we agreed to
19 that date without having the substantive piece that plaintiffs
20 are really looking for.

21 **THE COURT:** You don't want to wait. I see. I see.
22 So let me look at my thing, what I have on the 5th.

23 **MS. KUTSCHER:** If it makes plaintiffs more
24 comfortable, I don't foresee there being major issues with the
25 template we're talking about. And I think that's the major

1 thing that would affect the timing for the 10th. So I don't
2 imagine that we're really going to have an issue there.

3 So if that's the source of the concern with the date, that
4 Judge Corley is proposing, I don't think that that should be a
5 problem.

6 **MS. WEAVER:** It seems like the other issue, impasse
7 that was important for plaintiffs is that we had proposed that
8 Facebook begin a rolling production on July 3rd, and we don't
9 have agreement on that. And we had proposed they begin
10 July 3rd with productions every two weeks following that.

11 I mean, the schedule that we've agreed to is every,
12 frankly, extended. It's a four-month period of them conferring
13 with the custodians. We're trying to be respectful of
14 scheduling for the custodians themselves, but it does seem like
15 we should be able to start getting documents in a rolling
16 fashion.

17 **THE COURT:** Why don't we do this? Why don't we set
18 aside Friday June 5th at 2:00 p.m. Only if needed; right?
19 Because we're hopeful that you will come to an agreement on
20 your protocol and information exchange. So only if needed.

21 **MS. WEAVER:** Great. Thank you, Your Honor.

22 **THE COURT:** You can then submit it to me by Friday at
23 noon. I'll just review it in real time and we'll have a
24 discussion; right?

25 I don't want briefing. Then we'll have a discussion at

1 2:00 o'clock by video, if needed. If needed.

2 **MR. LOESER:** And, Your Honor, we're really hoping
3 that our joint statement will become a streak, and we'll have
4 two in row.

5 **THE COURT:** I see major improvement, major
6 improvement.

7 That's fine. It's all great. It's complicated. It's a
8 big, complicated case.

9 So which leads me to, let me give you -- so for the
10 privilege log protocol, should have a deadline for that for you
11 to come to an agreement or not?

12 **MS. WEAVER:** Yes, please.

13 **THE COURT:** Okay. And you guys are in the best
14 position to tell me what that deadline should be.

15 **MR. KO:** Your Honor, this is David Ko on behalf of
16 plaintiffs.

17 I really think that deadline should be sooner rather than
18 later. And I would suggest no later than two weeks from now.
19 And the reason I say that is because there are already, you
20 know, documents that have been produced by Facebook and we
21 expect substantial productions to occur.

22 You know, today there's a few deadlines that the parties
23 have agreed on that Facebook will proceed for RFPs that don't
24 require search terms, and there's several more coming in the
25 near future. So there are, you know, based on what we can

1 tell, hundreds if not thousands of documents that have already
2 been identified as redacted and withheld. So we just need to
3 be able to get a grasp on the privilege log sooner rather than
4 later before it gets too out of hand.

5 **THE COURT:** And this is what? What the form of the
6 privilege log would be? Is that what we're talking about?

7 **MR. KO:** Yes, Your Honor. The form and, also, the
8 deadline for when Facebook -- you know, obviously it goes both
9 ways, but for when the parties would produce the privilege log.

10 **MR. SNYDER:** This is Mr. Snyder. Hi.

11 I think there's a fundamental disagreement at this point,
12 which maybe we can resolve, about whether we should, at the end
13 of the case as usual, produce privilege logs or whether, as
14 plaintiffs have suggested, there be serial -- seriatim separate
15 privilege logs either attached to each production or otherwise.
16 We've told the plaintiffs that we'll discuss the issue over the
17 next several weeks, and we'll either come to an agreement or
18 present it to Your Honor for consideration.

19 **THE COURT:** When you say "as usual at the end of the
20 case" that's not my experience, "as usual." The rule requires
21 that it be done within a certain amount of time and with
22 production. So let me give you that guidance.

23 **MR. KO:** Your Honor, what we've noted from
24 Facebook as well, just -- obviously, your standing order
25 indicates that the parties should produce protective logs 14

1 days after production, so we've noted that.

2 And I think, you know, they have noticed the practical
3 difficulty. We're willing to be flexible with something that
4 makes sense, but I do think we need to have a privilege log
5 deadline.

6 **THE COURT:** 14 days is probably too short given the
7 volume of documents that are being produced. But why shouldn't
8 I give you a deadline of two weeks to figure out if you can
9 come to agreement?

10 **MR. SNYDER:** That's great, Judge.

11 **MS. KUTSCHER:** Sure.

12 Just for context, we did litigate this issue before Judge
13 Chhabria previously, and he had rejected plaintiff's proposal
14 that we produce privilege logs within 30 days of each
15 production saying that was not enough time.

16 So I think that's sort of the starting point for this
17 conversation.

18 **THE COURT:** Okay. Definitely. I'm not -- as much as
19 I would love to reconsider Judge Chhabria, I'm not going to do
20 that.

21 **MR. LOESER:** There is a lot of no comments.

22 **THE COURT:** Okay. So just some other little guidance
23 that will help you in your discussions.

24 The issues about the interrogatories. The default of 25
25 applies to every federal case, including a little FCRA case

1 where there's \$2,000 at stake. This is a big case, big case.
2 So probably not even -- I mean, if the plaintiffs propose 75,
3 take it. And then if within that 75 there is something that's
4 really burdensome or not appropriate as an interrogatory, it
5 seems to me that's where the discussion and the debate should
6 be, as opposed to the number; right?

7 The plaintiffs I don't think will make up interrogatories
8 to get to that 75. I would think they're going to have to
9 eliminate a great deal. But even within that 75 you may have
10 objections that they are not appropriate or too burdensome or
11 something.

12 I mean, that's not a ruling. I'm just giving you my
13 reaction to that.

14 I don't have any reactions to anything else, other than I
15 guess you're going to talk about briefing a privilege issue on
16 some documents that have -- that Facebook contends are
17 privileged that are not search term documents. So whatever you
18 guys decide about when to present that to me, that's fine.

19 **MR. LOESER:** And, Your Honor, that may be one
20 where -- I mean, Facebook's position is that it's premature to
21 consider briefing, and ours is we think it's not.

22 So the first fight will simply be when should that be
23 presented to Your Honor, and this may be one of those where you
24 get two different dates.

25 **THE COURT:** Okay. So let me preview something.

1 Often privilege disputes, the letter brief format doesn't work
2 very well. So if you want to do regular briefing, that's fine,
3 on whatever schedule you come up with.

4 But, you know, a letter -- privilege is more legal often
5 than some other stuff, and so regular briefing is fine.

6 **MR. LOESER:** And this is an issue that Facebook has
7 briefed previously. It's been an issue in some of the
8 regulatory actions. There is an order compelling production,
9 which I think Facebook is challenging.

10 So I think the parties will be well positioned to brief
11 the issues, and we'll try and reach agreement on precisely when
12 that should happen.

13 **THE COURT:** One question I had, because Facebook is
14 saying that it is up on appeal. Is it up on appeal in the
15 state appellate court, California appellate court?

16 **MS. KUTSCHER:** No. The Massachusetts Supreme
17 Judicial Court recently granted extraordinary review of the
18 issue, and we expect a ruling on that soon.

19 **THE COURT:** Is it a question in this case of
20 California law or federal law, the privilege issue?

21 **MS. KUTSCHER:** I think that's probably one of the
22 issues we'll be discussing.

23 **MR. LOESER:** One thing we're sure, it's not
24 Massachusetts law, but, you know, we'll see. Maybe it should
25 be.

1 **MR. SNYDER:** It's also the subject, Your Honor, of
2 litigation in Washington D.C. as well, this ADI issue. And,
3 you know, Your Honor, this is one of the dozens of issues the
4 parties were negotiating when the Court focused us all in April
5 and said let's go to Your Honor and go in a logical order.

6 So I think our view is that, you know, there are a panoply
7 of issues. This so-called ADI issue is one of dozens that
8 plaintiffs raised. And we certainly believe that that, like
9 apex deposition -- apex witnesses and others should be briefed
10 and litigated in front of Your Honor, but, again, not as we're
11 trying to complete custodians and search terms.

12 We should do this, as Judge Chhabria directed, in a
13 logical sequence, as opposed to cherrypicking substantive
14 issues randomly and sort of pre-litigating them.

15 **THE COURT:** All right. We'll see. We'll see. If
16 you can't come to agreement, which maybe you can't based on
17 what I've heard, then you can just present it to me and we'll
18 figure that out.

19 Okay.

20 **MS. WEAVER:** And, Your Honor, if I might. Leslie
21 Weaver.

22 The reason that we are pushing on the ADI issue is
23 because, again, this is an area where we think key players were
24 identified in the course of their own internal investigation
25 identifying bad behavior by third parties. So we would rather

1 know sooner rather than later who was involved in that.

2 So it does bear a little bit more on the instant
3 discussion, as opposed to something down the road.

4 **THE COURT:** You'll all have the opportunity, I
5 promise, to present --

6 (Audio interference)

7 **THE COURT:** ...assuming you can't agree, on the most
8 reasonable time frame.

9 **MS. WEAVER:** Okay.

10 **THE COURT:** So we have June 5th, 2:00 p.m. as a
11 backup in case you're unable to agree to your protocol and
12 information exchange, which you already have a schedule among
13 yourselves that you agree to, how you're going to address that.

14 We have two weeks from today as a deadline for an
15 agreement on a privilege protocol.

16 You've identified a number of other things that you've
17 come to agree on as to meet-and-confer.

18 So I'm wondering then if maybe our next hearing should be
19 the third week of June instead of that June 11th date, since I
20 had -- yeah, everyone is shaking their head. Yay, okay. I can
21 take my staycation then.

22 And we can do it on -- let me see here -- the 19th. I
23 don't know if you guys like ending your week with these or not.
24 I could do 9:00 a.m. on the 19th.

25 **MR. SNYDER:** That sounds great, Judge, for the

1 New Yorkers here, who by 4:00 o'clock in the afternoon on a
2 quarantine Friday are looking forward to peacing out.

3 **THE COURT:** Zoom fatigue. Does that good work with
4 plaintiff's, 9:00 a.m. on the 19th?

5 **MS. WEAVER:** Yes, Your Honor.

6 **THE COURT:** And a statement of whatever schedule I
7 gave you for whatever the statement is.

8 **MS. WEAVER:** Perfect.

9 **THE COURT:** Great.

10 **MR. LOESER:** Your Honor, just to flag the last issue
11 that we noted in our statement, number four on Page 3, which is
12 this issue of the scope of the search terms.

13 I do think this is something that's going to pop up. It
14 will pop up when we're negotiating search terms because we'll
15 be suggesting terms that we know from prior discussion for some
16 topics that Facebook believes are not within the scope of the
17 case and we strongly believe are.

18 So I think the best way for us to handle that is to go
19 ahead. Let that issue pop up. It probably -- may come up in
20 the first set of search term discussions or global terms, but
21 it is something that's going to come up and we would be
22 prepared to present it to for -- you know, for your evaluation.

23 **THE COURT:** And let me tell you, because this is a
24 referral for discovery and not settlement, I'll probably
25 consult with Judge Chhabria about that, because he's the trial

1 judge. I'm essentially just adjunct of him here.

2 So just so you know that. Maybe I'll invite him to one of
3 our hearings.

4 **MR. LOESER:** We haven't seen him in so long, it would
5 be great to...

6 **MR. SNYDER:** You can tell him -- you can tell him
7 that we would love to see him, and he can tease me -- he can
8 tease me mercilessly like he always does, and I've missed that.

9 **THE COURT:** I can tell you he's been quite busy. As
10 you probably know, we're opening up next month for some
11 criminal matters, just one courtroom at a time. So that
12 involves coordinating among the district court judges and the
13 various criminal things, and Judge Chhabria has been elected
14 traffic cop. I think it may be because he's the newest; right?
15 Just like the Supreme Court, the newest member of the court has
16 to open the (audio interference).

17 **MR. KO:** Your Honor, that's some good progress up
18 here in the Western District of Washington. They just
19 announced that there is no criminal trials until 2021.

20 **THE COURT:** Yeah. I mean, they are going to pretty
21 extraordinary lengths, and it's yet to be seen if we'll
22 actually be able to get a jury; right? Because we don't know
23 if people will show up when called, understandably. But they
24 are going to attempt.

25 **MR. LOESER:** So they are talking about up here in

1 state court of taking the convention center, which has huge,
2 large open, and putting jurors, you know, spaced out in a room
3 large enough for them to socially distance and still hear a
4 case.

5 **MR. SNYDER:** There is some question about the
6 constitutionality of, you know, bizarre plexiglassed remote
7 configurations where witnesses are far away from jurors and
8 jurors can't really read the demeanor.

9 You know, the Southern District of New York is working
10 hard on these safety protocols, and they are mindbogglingly
11 complex and expensive. It's like putting jurors in plexiglass,
12 sequestered from one another. Then what do you do the
13 deliberation room? How does that impede deliberations?

14 So there's substantial constitutional issues about fair
15 trial for a defendant.

16 **THE COURT:** The deliberations would likely be in
17 another courtroom. It's extraordinarily complicated, but
18 particularly when you have in-custody defendants.

19 Okay. Great. Thanks everybody. Have a good weekend --

20 **MS. KUTSCHER:** Your Honor?

21 **THE COURT:** Something else? Ms. Kutscher.

22 **MS. KUTSCHER:** This conversation gave me an
23 opportunity to look at my calendar for a second, and I'm
24 wondering if it might be possible for the parties to submit any
25 privilege log disputes before the hearing on the 19th rather

1 than by the 12th?

2 The reason being I think, as practical matter, the parties
3 are going to spend much of next week meeting-and-conferring
4 about the protocol we're putting together, and then we're going
5 to spend much of the following week meeting-and-conferring
6 about the first set of search terms. And as a practical
7 matter, I think we are going to need a lot of meet-and-confer
8 time on the privilege log and when we have too many
9 meet-and-confers in a week, it's very hard to get work done.
10 So I'm just wondering if we can space that out.

11 **THE COURT:** That was going to be just the deadline to
12 see if you can reach agreement, was two weeks from today. So
13 then you would have until the 18th to present it to me, and
14 then we could just it on the 19th.

15 **MS. KUTSCHER:** Okay. I think that's fine. Okay.

16 **THE COURT:** So by the deadline. I just meant the
17 deadline for you to hopefully agree.

18 **MS. KUTSCHER:** Okay. I think that will work. Thank
19 you.

20 **THE COURT:** Okay. Anything further? All right,
21 thank you.

22 **THE CLERK:** Court is in recess.

23 (Proceedings adjourned.)
24
25

CERTIFICATE OF OFFICIAL REPORTER

I certify that the foregoing is a correct transcript from
the record of proceedings in the above-entitled matter.

Debra L. Pas

Debra L. Pas, CSR 11916, CRR, RMR, RPR

Monday, June 1, 2020